STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 27, 2007
v	No. 264004 Presque Isle Circuit Court
TERRY LOYD GANSKE, Defendant-Appellant.	LC No. 04-092209-FC

Before: Bandstra, P.J., and Zahra and Owens, JJ.

PER CURIAM.

Defendant appeals on leave granted[1] his convictions following a jury trial of conspiracy to possess 450 to 999 grams of cocaine, MCL 750.157a, MCL 333.7403(2)(a)(*ii*), conspiracy to possess with intent to deliver 450 to 999 grams of cocaine, MCL 750.157a, MCL 333.7401(2)(a)(*ii*), possession with intent to deliver 50 to 449 grams of cocaine, MCL 333.7401(2)(a)(*iii*), and possession with intent to deliver under 5 kilograms of marijuana, MCL 333.7401(2)(d)(*iii*).[2] Defendant was sentenced to concurrent prison terms of 7 to 30 years for the conspiracy to possess cocaine charge, 7 to 30 years for the conspiracy to possess with intent to deliver cocaine charge, 7 to 20 years for the possession with intent to deliver cocaine charge, and 2 to 4 years for the possession with intent to deliver marijuana charge. Plaintiff sought leave to

[1] Defendant's appeal as of right was dismissed by this Court "for want of prosecution, appellant having failed to timely file the brief on appeal." *People v Ganske*, unpublished order of the Court of Appeals, entered March 28, 2006 (Docket No. 264004). Defendant's subsequent motion to reinstate was denied as untimely. *People v Ganske*, unpublished order of the Court of Appeals, entered June 9, 2006 (Docket No. 264004). However, our Supreme Court found defendant's failure to timely file his brief on appeal resulted from ineffective assistance of counsel and so reinstated his appeal. *People v Ganske*, 477 Mich 1122; 730 NW2d 245 (2007).

[2] Defendant was tried jointly with his girlfriend, Sheila Markey. Markey's appeal in Docket No. 264005 was originally consolidated with defendant's present appeal, but was deconsolidated after defendant's appeal was dismissed for failure to prosecute. *People v Ganske*, unpublished order of the Court of Appeals entered May 4, 2006 (Docket No. 264004); *People v Ganske*, unpublished order of the Court of Appeals, entered March 28, 2006 (Docket No. 264004). Markey's convictions and sentences were affirmed in *People v Markey*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2007 (Docket No. 264005).

appeal in Docket No. 270723, challenging the trial court's scoring of defendant's sentencing guidelines. In lieu of granting leave, this Court remanded for rescoring of the guidelines range for defendant's two conspiracy convictions and for resentencing. *People v Ganske*, unpublished order of the Court of Appeals, entered September 8, 2006 (Docket No. 270723). Resentencing has yet to occur. We now affirm defendant's convictions. Defendant's sentences remain subject to this Court's prior ruling in Docket No. 270723.

In February 2004, William Moran was apprehended by Georgia authorities with large quantities of marijuana and cocaine in his car, which he alleged he was to deliver to defendant in Michigan. As part of a plea agreement with Georgia authorities, Moran agreed to deliver the drugs to defendant in Michigan while under police surveillance. After Moran completed the delivery, police arrested defendant on multiple drug charges.

Defendant first argues that venue was not proper in Presque Isle County for the charges of possession with intent to distribute 50 to 449 grams of cocaine and possession with intent to distribute under 5 kilograms of marijuana. We disagree. We review a trial court's determination regarding the existence of venue in a criminal prosecution de novo. *People v Webbs*, 263 Mich App 531, 533; 689 NW2d 163 (2004). "Venue is part of every criminal prosecution and must be proved by the prosecutor beyond a reasonable doubt. Due process requires that trial of criminal prosecutions should be by a jury of the county or city where the offense was committed, except as otherwise provided by the Legislature." *People v Fisher*, 220 Mich App 133, 145; 559 NW2d 318 (1996) (citations omitted). "Whenever a felony consists or is the culmination of two or more acts done in the perpetration thereof, the felony may be prosecuted in any county in which any one of the acts was committed." MCL 762.8; see also *Webbs*, *supra* at 533.

In order to deliver drugs to defendant, Moran would call defendant at defendant's place of residence in Presque Isle County to establish a meeting place and time. Calling defendant was a necessary step to arrange the meeting to effectuate delivery, and thus, was one of the acts committed that culminated in defendant's offense of possessing the drugs with the intent to distribute them. Because Moran telephoned defendant at his residence in Presque Isle County, the trial court correctly concluded that the resulting prosecution was proper there. MCL 762.8; *Webbs*, *supra* at 533.

Defendant next argues that there was insufficient evidence presented at trial to support his convictions of conspiracy to receive 450 to 999 grams of cocaine and conspiracy to possess with intent to deliver 450 to 999 grams of cocaine. "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). A conspiracy to receive or deliver a given amount of drugs necessarily requires proving that a defendant specifically intended to deliver or receive the amount required for the offense underlying the conspiracy. *People v Mass*, 464 Mich 615, 638-639; 628 NW2d 540 (2001). So, in order to sustain defendant's conviction of conspiracy to receive 450 to 999 grams of cocaine, there must be sufficient evidence to support a reasonable fact-finder in concluding that defendant specifically agreed to receive at least 450 grams of cocaine. *Id.*

Defendant first asserts that there was insufficient evidence presented at trial to establish that he specifically agreed with Moran to take delivery of at least 450 grams of cocaine. We disagree. Moran testified that over a period of 18 months, he delivered 41 to 43 ounces (1148 to 1204 grams) of cocaine to defendant. Moran also testified that his third shipment of drugs to defendant included 7 ½ ounces (210 grams) of cocaine. Thus, in the aggregate, taken in the light most favorable to the prosecutor, *Johnson, supra*, there was evidence that Moran delivered well more than 450 grams of cocaine to defendant. And even if defendant did not know in advance the quantity of cocaine in any one individual shipment, his knowledge of the amount of cocaine in previous shipments considered together with the number of additional shipments he continued to receive from Moran provide ample basis to conclude that defendant agreed with Moran to receive at least 450 grams of cocaine.

Defendant also argues that there was insufficient evidence presented at trial to establish that he specifically agreed with Moran that he would be receiving and possessing the cocaine in order to distribute it. However, given the substantial quantity of cocaine defendant received from Moran (approximately 1150 to 1200 grams) and the high street price of the drug (at least $250 per ½ ounce or 3.5 grams), the jury could reasonably infer that the drugs were meant for sale rather than just personal use. See *People v Wolfe*, 440 Mich 508, 524; 489 NW2d 748 (1992) (quantity of narcotics can infer intent to deliver). Further, the method of payment used by Moran and defendant—where Moran would front the cocaine on credit to defendant and defendant would pay Moran over time after delivery—also provides evidence of an arrangement whereby Moran would provide defendant with the drugs for subsequent sale (with Moran being paid out of the proceeds).

Defendant next argues that the jury was not properly instructed that to convict him of conspiracy to possess or conspiracy with intent to distribute a given amount of cocaine, it must be proved beyond a reasonable doubt that defendant specifically intended to possess with the intent to distribute the specific amount of cocaine alleged. We disagree.

We review claims of instructional error de novo. *People v Martin*, 271 Mich App 280, 353; 721 NW2d 815 (2006). Where unpreserved, we review such claims for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999); *Martin, supra*. Jury instructions must clearly present the case and the applicable law to the jury and must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Clark*, 274 Mich App 248, 255-256; 732 NW2d 605 (2007). And no error results from the omission of an instruction if the instructions as a whole covered the substance of the omitted instruction. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

As defendant points out, when instructing the jury as to the charge, presented in count III, of possession with intent to deliver 50 grams or more of cocaine, the trial court failed to include an instruction on specific intent. However, the trial court had previously read that instruction to the jury twice, in connection with the charge, presented in count I, of conspiracy to possess 1,000 or more grams of a cocaine and in connection with the charge, presented in count II, of

conspiracy to possess with intent to deliver 450 to 999 grams of cocaine. Further, after realizing that it omitted the specific intent instruction in connection with the possession with intent to deliver charge, the trial court consulted with counsel for both parties regarding reinstructing the jury, but the parties agreed that it was unnecessary to do so because the jury was "accurately informed as to" the elements of the offense. Thus, we first note that defendant's affirmative expression of satisfaction with the instructions as given waived any error in those instructions, precluding appellate review. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Even absent such waiver, however, we conclude that the jury was sufficiently informed of the specific intent required for the offense of possession with the intent to deliver cocaine from the instructions as a whole, and particularly from the instructions for count two, conspiracy to possess cocaine with intent to deliver. *Kurr, supra.*

Defendant next argues that he was denied the effective assistance of counsel by counsel's failure to raise the issue of venue for the two possession counts, for failing to object to the lack of corroborating evidence for testimony regarding what police overheard over a wire transmitter Moran was wearing during the delivery of drugs to defendant, for failing to argue that the loss of the police recordings of the conversation overheard via Moran's wire entitled defendant to the presumption that the recordings would have provided evidence helpful to defendant and harmful to plaintiff, for failing to object to the lack of a jury instruction regarding specific intent, and for failing to object to the legitimacy of the charges for violating his fundamental constitutional rights. We see no merit in any of these assertions.

The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under professional norms, and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309, 312-313; 521 NW2d 797 (1994). An appellate court will not second-guess matters of trial strategy or use the benefit of hindsight when assessing counsel's competence. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

First, as noted above, Presque Isle County was an appropriate venue for the possession charges. There is no obligation for counsel to raise a futile or meritless motion. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Second, defendant has provided no authority for his contention that the loss of the recordings of the police surveillance entitled him to a favorable presumption regarding the contents of those lost tapes. In any event, defendant cannot establish the requisite prejudice in light of the overwhelming evidence adduced against him. Third, as noted above, the jury was sufficiently informed of the specific intent requirement for count three when the instructions are considered as a whole. Moreover, there was overwhelming evidence that defendant was buying cocaine from Moran with the intent to sell it. Therefore, defendant's assertions that he received ineffective assistance of counsel on these grounds are without merit.

Defendant's final assertion of ineffective assistance—that counsel should have objected to the constitutionality of the drug laws he was charged with violating—stems from his final argument on appeal. Specifically, defendant asserts that the statutes making possession and

distribution of cocaine and marijuana illegal are unconstitutional for a multitude of reasons, including that they violate the right to privacy, the right to associate, the freedom to contract, to own property, to engage in interstate commerce, and to be free of cruel and unusual punishment. Defendant further argues that the rule of lenity and the rule of strict construction of penal statutes also preclude his prosecution. We disagree. Unpreserved claims of constitutional error may only be reviewed for plain error affecting substantial rights. *Carines, supra* at 774.

"The classification of cocaine as a controlled substance, because of its high potential for abuse, is clearly within the state's police powers to protect the public health." *People v Puertas*, 122 Mich App 626, 630; 332 NW2d 399 (1983). Defendant's claims that classifying cocaine as a narcotic violates due process, equal protection, and cruel and unusual punishment are also without merit. *Id*. Defendant's other constitutional arguments are equally unavailing. And defendant does not explain what could possibly be ambiguous about the drug possession and distribution laws that would justify applying the rule of lenity or negating this prosecution under the rule of strict construction.

In short, defendant's constitutional arguments on this issue are wholly without merit. Thus, defendant also fails to establish plain error affecting substantial rights. Further, given that counsel is not required to raise a futile argument, *Fiske, supra* at 182, defendant's final assertion of ineffective assistance is also without merit.

Defendant's convictions are affirmed. Defendant's sentences remain subject to this Court's prior ruling in Docket No. 270723.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Donald S. Owens